H.R. 2070, the Puerto Rico Self-Determination Act of 2021

Executive Summary

The Department of Justice agrees that the people of Puerto Rico should be allowed to choose whether to become a nation independent of the United States, become a state within the United States, or retain the current status of a territory. Insofar as H.R. 2070 would facilitate a choice among those three options, which we believe are the three constitutional options available to Puerto Rico, the Department supports the bill. In the section-by-section analysis, the Department explains the basis for its view more fully and advises of its comments on certain sections of the bill.

Section-by-Section Analysis

Section 1 (Short Title)

The Department has no comment on this section.

Section 2 (Findings)

The Department has no comment on this section.

Section 3 (Puerto Rico Status Convention)

Section 3(a) provides that the Puerto Rico legislature will have "inherent authority" to call a status convention "for the purpose of proposing to the people of Puerto Rico self-determination options." The convention, consisting of delegates elected by Puerto Rico voters, would be tasked with "debat[ing] and draft[ing] definitions on self-determination options for Puerto Rico, which shall be outside the Territorial Clause of the United States Constitution," and presenting those options, along with at least one transition plan for each option, to Puerto Rico voters in a referendum. H.R. 2070, § 3(c). Once assembled, the convention would be "dissolved only when the United States ratifies the self-determination option presented to Congress by the status convention as selected by the people of Puerto Rico in the referendum." *Id.* § 3(a)(1).

The Department has three comments on this section.

1. The Department's first comment relates to the reference to the Puerto Rico legislature's having "inherent" authority to call a status convention. H.R. 2070, § 3(a). We surmise that this description of the nature of Puerto Rico's authority is intended to acknowledge the Commonwealth's significant autonomy and powers of self-government. We note, however, that the use of the word "inherent" may create confusion as to the ultimate source of the Puerto Rico government's authority. As the Supreme Court recently noted, even though "Puerto Rico today has a distinctive, indeed exceptional, status as a self-governing Commonwealth," the "ultimate source" of Puerto Rico law is an enactment of the U.S. Congress. *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1874 (2016) (concluding that Puerto Rico and the United States are not separate sovereigns for purposes of the Double Jeopardy Clause). Describing Puerto

Rico's authority as "inherent"—that is, "existing . . . as a permanent attribute or quality . . . indwelling, intrinsic," OED Online (Mar. 2021)—when in fact that authority derives from Congress, is legally inaccurate. The Department does not object to some sort of acknowledgment of Puerto Rico's self-governance, but to avoid confusion as to the source of the Puerto Rico legislature's authority, we recommend striking the word "inherent."

2. Second, the Department notes that section 3 appears to be in tension with the Executive Branch's longstanding "policy . . . to enable Puerto Ricans to determine their preference among options for the islands' future status that are not incompatible with the Constitution and basic laws and policies of the United States" and to "consider and develop positions on proposals, without preference among the options, for the Commonwealth's future status." Exec. Order No. 13183 (Dec. 23, 2000). The tension results because of the combination of several provisions: section 3(a)(1), which provides that the convention would be "dissolved only when the United States ratifies the self-determination option presented to Congress by the status convention as selected by the people of Puerto Rico" pursuant to the referendum authorized in section 5; section 3(c)(1), which expressly instructs the status convention to develop options for Puerto Rico that are "outside the Territorial Clause of the United States Constitution"; and section 3(c)(3), which provides that the convention "shall . . . select and present to the people of Puerto Rico the self-determination options that will be included in the referendum under section 5." *See also* § 5(a)(1)(B) ("A referendum vote by the people of Puerto Rico . . . may consist of choices each composed of a self-determination definition and accompanying transition plan as presented by the delegates under section 3").

Taken together, these provisions appear to eliminate the current territorial status as an available choice for the people of Puerto Rico under the procedures in the bill. Moreover, these provisions may be read to imply that the United States has determined that the people of Puerto Rico may not decide to retain the island's current territorial status, departing from the Executive Branch's longstanding view that "Puerto Ricans should determine for themselves the future status of the Island" and the federal government's responsibility is to facilitate "the desire of the people of Puerto Rico to change status or to establish, for some period of time, that they have chosen no change in status." Report by the President's Task Force on Puerto Rico's Status at 23–24 (Mar. 2011) ("2011 Task Force Report"); *see also* Presidential Memorandum of December 23, 2000 ("Resolution of Puerto Rico's Status") (noting that "[s]uccessive Presidents . . . have supported the people of Puerto Rico in determining their status preference from among options that are not incompatible with the Constitution and basic laws and policies of the United States" and concluding that the Executive Branch has "the responsibility to help Puerto Ricans obtain the necessary transitional legislation toward a new status, if chosen"). One way to address these concerns is to remove the phrase "which shall be outside the Territorial Clause of the United States Constitution" from section 3(c)(1).

3. Finally, the Department notes that section 3 does not specify that the only constitutionally permissible status options available to the status convention—and thus the only options that Congress could subsequently adopt by joint resolution, *see* H.R 2070, § 6—are statehood, independence, or Puerto Rico's current status as a territory. Independence is a general

term that refers to the possibilities both of full independence from the United States and of a compact of free association, in which Puerto Rico would become a sovereign nation but would continue to have close ties to the United States under the terms of a mutually agreed-upon compact. *See* 2011 Task Force Report at 25. Were Puerto Rico to choose a compact of free association, it would occupy a status similar to the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau. *Id.*

As has been the Department's consistent view since 1991, we continue to believe that the Constitution limits Puerto Rico to three constitutional choices: the current territorial status, statehood, or independence. The District of Columbia aside, land under United States sovereignty must be either a state or a territory; and if land is "not included in any State," it "must necessarily be governed by or under the authority of Congress." *First Nat'l Bank v. Yankton County*, 101 U.S. 129, 133 (1879). Congress may, in its administration of non-state land, afford such a territory considerable powers of self-government, as it has already done with Puerto Rico. *See* Puerto Rican Federal Relations Act, Pub. L. No. 81-600, 64 Stat. 319 (1950), *codified at* 48 U.S.C. §§ 731b–731e. But Congress cannot constitutionally relinquish its ability to legislate with respect to that territory under the Territories Clause unless it either admits the territory as a state, U.S. Const. art. IV, § 3, cl. 1, or enacts legislation making the territory independent and no longer subject to the jurisdiction of the United States. *See* *Mutual Consent Provisions in the Guam Commonwealth Legislation*, __ Op. O.L.C. Supp. __, at *5 (July 28, 1994) ("*Mutual Consent*") ("The requirement that the delegation of governmental authority to the non-state areas be subject to federal supremacy and federal supervision means that such delegation is necessarily subject to the right of Congress to revise, alter, or revoke the authority granted.") (citing *Dist. of Columbia v. Thompson Co.*, 346 U.S. 100, 109 (1953), among other cases). In other words, there is no constitutionally permissible status "outside of the Territorial Clause" other than statehood or independence (including free-association agreements).

Our view on this issue also rests on the general rule that one Congress cannot irrevocably bind subsequent Congresses. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (Marshall, C.J.) (noting that legislative acts are "alterable when the legislature shall please to alter [them]"). Although this general rule is subject to limitations imposed by the Due Process Clause of the Fifth Amendment, those limitations do not apply to protect Puerto Rico's political status from congressional revision if Puerto Rico remains a territory. *Mutual Consent* at *8–9. Territories, like states and their political subdivisions, are not "persons" for purposes of due process. *Id.* at *6–7. And a particular political relationship with the national government is not the type of vested property right that due process protects. *Id.* at *8–9 (citing *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 55 (1986), among other cases).

In the past, Congress has purported to enter into covenants with territories that would be alterable only with mutual consent. *See, e.g.*, Pub. L. No. 24-241, 90 Stat. 263, 264 (1976) (approving the "Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America," section 105 of which provides that certain provisions of the Covenant "may be modified only with the consent of the Government of the United States and the Government of the Northern Mariana Islands"); Act of Aug. 7, 1789, ch. 8,

1 Stat. 50, 52 n.a (maintaining the Northwest Ordinance, including a prefatory clause providing that the articles of the compact would "forever remain unalterable, unless by common consent"); *Mutual Consent* at *2 n.2. But in view of the foregoing principles, we believe that these provisions cannot be binding—a view to which the Department has long subscribed. *See Mutual Consent* at *13.

We note, in addition, that the principle of a current Congress's not being able to bind future Congresses would also apply to any compact of free association entered into with Puerto Rico if Puerto Rico were to choose that type of independence. As a matter of our domestic law, such a compact would necessarily be revocable or subject to revision by a subsequent act of Congress. *See Medellín v. Texas*, 552 U.S. 491, 509 n.5 (2008) ("[A] later-in-time federal statute supersedes inconsistent treaty provisions.").

Section 4 (Congressional Bilateral Negotiating Commission)

Section 4(a) would establish a "Congressional Bilateral Negotiating Commission . . . to provide advice and consultation to delegates elected" to the status convention established under section 3. H.R 2070, § 4(a). It would be composed of a number of members of Congress, including the chairs and ranking members of the relevant congressional committees, members selected by congressional leadership, and the Resident Commissioner of Puerto Rico. *Id.* § 4(b)(1). In addition, the Commission would include "a member from the Department of Justice" and "a member from the Department of the Interior," both "with the consent of the Speaker of the House of Representatives and majority leader of the Senate." *Id.* § 4(b)(1)(H), (I).

The Commission would seem to be a Legislative Branch entity that reports only to congressional leadership and is limited to purely advisory functions, such as "develop[ing] recommendations regarding self-determination options on constitutional issues and policies" and "provid[ing] technical assistance and constitutional advice to the delegates during the Puerto Rico status convention." *Id.* § 4(c). Consistent with separation of powers constraints, we do not understand that policy or legal recommendations issued by the Commission would bind the Executive Branch. *See, e.g., Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 276 (1991) ("If the power is executive, the Constitution does not permit an agent of Congress to exercise it."); *Buckley v. Valeo*, 424 U.S. 1, 139 (1976) (per curiam) (holding that congressional appointees may "perform duties only in aid of those functions that Congress may carry out by itself, or in an area sufficiently removed from the administration and enforcement of the public law").

Finally, we note that the name of the Commission, the "Congressional Bilateral Negotiating Commission," does not seem to be an apt description of the Commission's advisory duties. The Department does not read the duties of the Commission to include negotiations with the convention and would accordingly suggest that the name be modified to more accurately characterize the Commission's role—e.g., the Congressional Advisory Commission.

Section 5 (Puerto Rico Status Referendum; Education Campaign)

The Department has identified no legal concerns with this provision, which sets out the structure for a referendum vote on the status options developed by the convention under section 3. We note, however, that in the past Congress has sought the Department of Justice's involvement in ensuring that the options presented to the Puerto Rican people in a plebiscite are constitutional. *See* H.R. Rep. No. 113-171, at 54 (2014). Were the legislation to provide for the Department of Justice to have a certification role here, it would help ensure that any status option developed by the convention and selected by the people of Puerto Rico would be constitutional and thus could be ratified by Congress.

Section 6 (Congressional Deliberation and Enacting Resolution)

Section 6 would provide that "[i]f the referendum under this Act is approved by the people of Puerto Rico, Congress shall approve a joint resolution to ratify the preferred self-determination option approved in that referendum vote." This provision is constitutional only if it is read to mean that Congress shall consider *whether* to approve a joint resolution ratifying the results of the referendum. If, instead, it were read to bind Congress to approve a joint resolution, it would impermissibly constrain Congress.

To address this constitutional concern, the Department recommends changing "shall" to "may" in section 6. Alternatively, section 6 could be amended to provide that Puerto Rico's status shall become whatever the people selected. The Department has concluded that contingent legislation of that type is constitutionally permissible. *See Altering Puerto Rico's Relationship with the United States Through Referendum*, 36 Op. O.L.C. 93, 93–94 (2012) (concluding that "legislation conditioning a change in Puerto Rico's political relationship with the United States on the results of one or more referenda by the Puerto Rican electorate, without subsequent congressional action, would be constitutional, insofar as the referendum . . . presented voters in the territory with a limited set of options specified in advance by Congress"). However, for this alternative approach to be available, it would be necessary for Congress to approve the options presented to the Puerto Rican people ahead of the vote (or to provide a list of acceptable options from which the status convention could choose).